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SUPREME COURT OF THE [redacted]

OCTOBER TERM, 19[redacted]

No. 534

LOYD KENNEDY,

Petitioner,

vs.

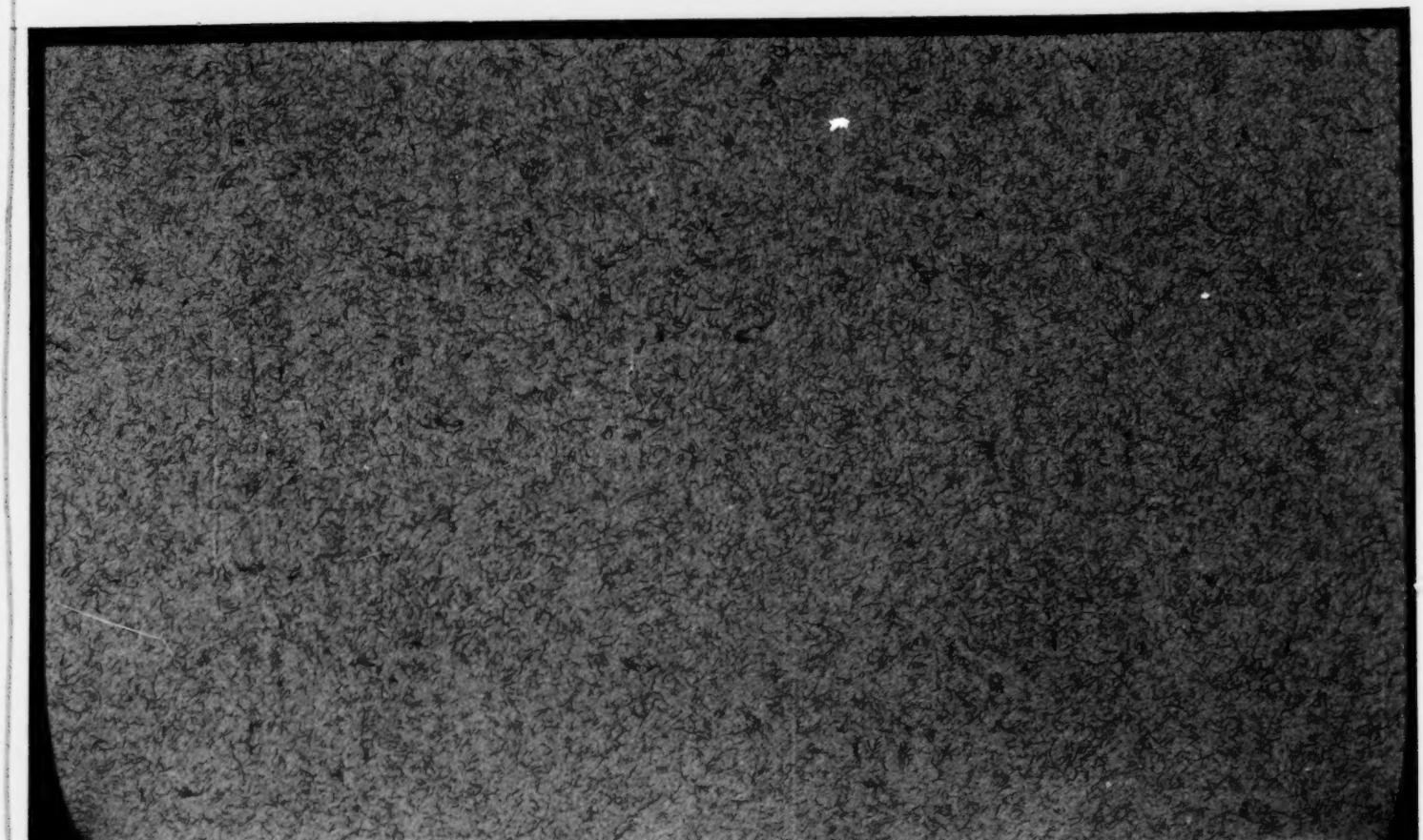
STATE OF TENNESSEE,

Respondent.

MOTION TO DISPENSE WITH PRINTING OF RECORD; PETITION FOR CERTIORARI AND BRIEF IN SUPPORT THEREOF.

THURGOOD MARSHALL,
W. ROBERT ING,
Z. ALEXANDER LOONY,
Attorneys for Petitioner.

MAURICE WEAVER,
EDWARD R. DUDLEY,
FRANKLIN H. WILLIAMS,
Of Counsel.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 534

LOYD KENNEDY,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent

MOTION TO DISPENSE WITH PRINTING OF RECORD

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully moves this Court for permission to dispense with the printing of the record in the instant case.

Counsel for petitioner is in possession of approximately $400 representing the balance of monies received for this case from voluntary contributors, the said money having been contributed for the purpose of defending petitioner and other individuals who were jointly and severally indicted for crimes arising out of interracial disturbances occurring in Columbia, Tennessee, on the 25th day of February, 1946. Counsel for petitioner has been advised by

the Clerk of this Court that the said sum of $400, which is all that is available to petitioner's counsel to cover expenses involved in this cause, will not be sufficient to pay for the printing of the record herein.

WHEREFORE, petitioner respectfully prays leave to dispense with the printing of the record herein and permission to file a typewritten record with this Court.

Respectfully submitted this 16th day of January, 1948.

LOYD KENNEDY,
By THURGOOD MARSHALL,
20 West 40 Street,
New York 18, New York;
W. ROBERT MING,
Chicago, Illinois;
Z. ALEXANDER LOOBY,
Nashville, Tennessee,
Attorneys for Petitioner.

MAURICE WEAVER,
Chattanooga, Tennessee;
EDWARD R. DUDLEY,
FRANKLIN H. WILLIAMS,
20 West 40 Street,
New York 18, New York,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 534

LOYD KENNEDY,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a Writ of Certiorari issue to review a judgment of the Supreme Court in the State of Tennessee, affirming a judgment and sentence of the Circuit Court of Maury County, Tennessee, wherein petitioner, a Negro, was sentenced to not more than five years imprisonment for unlawfully and feloniously committing an assault with intent to commit murder in the first degree on the body of one Ray Austin, a white man, and to reverse such judgment and sentence or to obtain a new trial.

I

Jurisdictional Statement

Petitioner presents this petition pursuant to Section 237(b) of the United States Judicial Code as amended February 13, 1925, 43 Stat. 937, 28 U. S. C. 344(b).

Petitioner prays that a Writ of Certiorari issue to review the decree entered on June 24, 1947, in the Supreme Court of Tennessee, which is the highest court of said State, in the cause in that court entitled *Loyd Kennedy* v. *State of Tennessee;* Suggestion of Error having been duly filed in said Supreme Court of Tennessee and overruled on October 21, 1947, and petitioner now being at liberty on $5,000 bond pending the action of this Court upon this petition.

The nature of the case and the rulings below which bring the case within the jurisdictional provision of Section 237(b), *supra,* appear from the following:

The claim of Federal constitutional rights is specifically raised in the Plea in Abatement (R. 10a-10j), the motion to quash the several panels of veniremen (R. 321), and upon the exceptions taken to the rulings of the trial judge in refusing petitioner the opportunity to introduce testimony in evidence concerning the systematic and long continued custom and practice of exclusion of Negroes from juries in Maury County (R. 326-327). These Federal questions were substantially passed upon by the Supreme Court of Tennessee in its opinion and the claim of Federal rights denied.

The claim so made and denied is that the conviction of petitioner, a Negro, by a trial jury upon an indictment found and returned by a grand jury, from which juries all qualified Negroes were and have been for a long period of years systematically excluded solely because of their race and color, was in contravention and violation of the equal protection and due process clauses of the Fourteenth Amend-

ment to the Constitution of the United States. The further claim made and denied is that the refusal of the trial court to allow the introduction of evidence of the systematic and long continued exclusion of Negroes from juries in Maury County, Tennessee, denied petitioner due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The following cases, among others, sustain the jurisdiction of this court to determine the invalidity of a conviction by a trial jury found upon an indictment returned by a grand jury when from both juries Negroes were and have been systematically excluded in that county over a long period of years solely because of race: *Neal* v. *Delaware,* 103 U. S. 370; *Norris* v. *Alabama,* 294 U. S. 587; *Hollis* v. *Oklahoma,* 295 U. S. 395; *Hale* v. *Kentucky,* 303 U. S. 613; *Rogers* v. *Alabama,* 192 U. S. 226; *Pierre* v. *Louisiana,* 306 U. S. 354; *Smith* v. *Texas,* 311 U. S. 128; *Hill* v. *Texas,* 316 U. S. 400; *Patton* v. *Mississippi,* — U. S. —, No. 122, Oct. Term, 1947. These cases established clearly that the systematic exclusion of Negroes from juries solely because of race may be established and proved by testimony concerning the composition of juries within a county over a long period of years prior to the immediate case. *Neal* v. *Delaware, supra; Norris* v. *Alabama, supra;* and *Pierre* v. *Louisiana, supra; Carter* v. *Texas,* 177 U. S. 442; *Patton* v. *Mississippi, supra.*

Statement of Facts

On Monday, February 25, 1946, in Columbia, Tennessee, a Negro youth struck a white store proprietor because of the proprietor's having slapped the Negro's mother. Immediately, the white community became aroused and rumors of lynching spread throughout the Negro community. The State Highway Patrol was ordered to Columbia at about 9 o'clock that night along with units of the State National

Guard. A cordon of patrolmen was thrown around the Negro area known as "Mink Slide." The sheriff and Commissioner of Safety agreed to keep the police surrounding this area for the purpose of preventing anyone from coming in or going out; and, further agreed to enter the area about daylight and arrest everyone found therein. From midnight until daybreak, intermittent firing occurred throughout the town. About sunrise on the morning of the 26th, the order was given to the patrolmen to "move in" on the area. The police and National Guardsmen, working in units, went from house to house and business establishment to business establishment, arresting all individuals found. They wantonly destroyed property and brutalized the Negro citizens. Terror reigned throughout the Negro community. One group of policemen, headed by the Sheriff and including about twenty-five (25) officers and civilians and armed with riot guns and submachine guns proceeded down the street, going from door to door, ordering all individuals therein to come out with their hands up. The only buildings so approached were those occupied by Negroes.

Upon arrival in front of the Blair Barber Shop, the Sheriff allegedly called out for anyone inside to come out quietly. At this point, it is alleged, a shotgun blast fired from inside the barber shop through the plate glass window struck one of the officers, Ray Austin, hitting him in the leg. The wound was minor in nature for the officer continued on duty for the rest of the week. Only one person, in the group, a policeman, could describe in any way the person inside the barber shop who allegedly fired the shotgun. This witness stated emphatically that such person was larger than petitioner but about the size of his co-defendant. The group then fired hundreds of machine gun bullets into the shop, burst inside, found petitioner pressed against the wall, apparently "scared to death" and arrested him and

his co-defendant, William A. Pillow, a Negro, who was also found within the barber shop. They were charged with having committed assault and battery with intent to commit murder in the first degree on the body of Patrolman Ray Austin, a white man. They were subsequently indicted on the 21st day of March, 1946, and having pleaded "Not Guilty," were tried in the Circuit Court of Maury County, Tennessee, at the February, 1946 Term. The jury acquitted petitioner's co-defendant and convicted petitioner of assault with intent to commit murder in the second degree, fixing his punishment at not more than five (5) years in the State Penitentiary. The Supreme Court of Tennessee affirmed the conviction on the 26th day of June, 1947, and overruled Assignments of Error on the 21st day of October, 1947.

Errors Below Relied Upon Here

Petitioner relies upon the following points:

I. The Supreme Court of the State of Tennessee erred in affirming the conviction of petitioner, a Negro, upon an indictment found and returned by the grand jury of a county where all qualified Negroes were and have been for a long period of years systematically excluded from service on grand juries solely because of race or color in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

II. The Supreme Court of the State of Tennessee erred in affirming the conviction of petitioner, a Negro, by a trial jury in a county where all qualified Negroes were and have been for a long period of years systematically excluded from trial juries solely because of race or color in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

III. The Supreme Court of the State of Tennessee erred in affirming the conviction of petitioner, a Negro, where the trial court denied him due process of the law as guaranteed by the Fourteenth Amendment to the United States Constitution in refusing to allow the introduction of evidence of the systematic exclusion of Negroes from its juries over a long period of years prior to petitioner's trial.

Facts in Support of Errors

Petitioner's proof showed overwhelmingly by the testimony of more than 200 white and Negro resident-witnesses, from all walks of life in Maury County, that for more than fifty years no Negro had ever served on a grand or petit jury in that county;[1] as one sixty-one year old, life resident of the county stated, "I have been here all my life and never heard of one- (R. W. 656). Petitioner's proof also established by testimony of such witnesses that there were large numbers of Negroes, citizen-residents of Maury County, possessing all of the legal qualifications for jury service, none of whom had ever been called to serve or served or who knew of any Negro having been called or had served on a grand or petit jury in Maury County, Tennessee, prior to the instant trial although approximately 9,000 white males over twenty-one and 3,000 Negro males over twenty-one resided therein, according to the 1940 Federal census.[2]

Petitioner's proof established clearly that such absence of Negroes from juries in Maury County was the result of a systemaic exclusion based solely upon race or color and

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[1] See: Testimony contained in Wayside Bill of Exceptions, *State* v. *Blair*, which by stipulation of counsel was made part of the record of the instant case. Page references to testimony from the Wayside Bill is referred to herein by the letters "RW"; page references to the instant record are marked as usual "R."

[2] See: Certified copy of "Populati[illegible]wn" attached hereto and marked "Exhibit "A."

pursuant to an established custom and usage of county officials within the meaning of decisions of this Court. This testimony was uncontradicted and in the face thereof the trial court overruled petitioner's Plea in Abatement. The affirmance of the decision by the Supreme Court of the State of Tennessee and the subsequent holding therein that no Federal rights had been denied petitioner by such exclusion constitutes grounds upon which petitioner appeals to this Court.

Petitioner subsequently moved to quash the several panels of veniremen from which the trial jury was drawn. In such motion, he alleged, among other things, that all of the persons whose names were drawn and who were summoned for jury service in the instant case were white; that there are numerous colored citizens in the county, qualified for jury service; that the administrative officers responsible for selecting jurors systematically excluded Negroes from juries over a long period of years solely on account of race pursuant to custom and practice; that to circumvent recent decisions of this Court a conspiracy or common understanding obtained to call one or two Negroes "whenever it should appear that such systematic exclusion would be challenged"; that such calling was never in good faith as no Negroes are ever permitted to serve on juries in the county; all in violation of petitioner's constitutional rights (R. 321).

Petitioner then requested the opportunity to offer proof in support of his motion—"to show that for more than half a century Negres have been excluded from jury service in Maury County." At the time of such request, the following occurred:

> "The Court: We could hear proof only as to the formation of the panel or panels which were formed in the selection of this trial jury.
>
> "Mr. Looby: If the Court please, let the record show that we are prepared to offer proof in support of the

allegations prior to that time and that the proof is not offered merely in obedience to your Honor's ruling.

"The Court: You can except to the action of the Court.

"Mr. Looby: Very well, your Honor, we so except.

"The Court: All right" (R. 326-327).

This ruling was substantial error and in violation of petitioner's constitutional right to due process. Numerous decisons of this Court have held that systematic exclusion of Negroes from juries can be established by a showing of the non-service of Negroes over a long period of years and the existence of many Negroes qualified for jury service in a particular county. The refusal of the trial court to allow the introduction of such proof and the approval of this ruling through affirmance by the Supreme Court of Tennessee constitutes error upon which petitioner relies and provides further grounds upon which petitioner appeals to this Court.

WHEREFORE, petitioner prays that this Court, pursuant to Section 237(b) of the United States Judicial Code, as amended February 13, 1925, 43 Stat. 937, 28 U. S. C. 344(b), issue a Writ of Certiorari to review the judgment of the Supreme Court of the State of Tennessee affirming your petitioner's conviction for assault with the intent to commit murder in the second degree as aforesaid.

All of which is respectfully submitted this 16 day of January, 1948.

LOYD KENNEDY,
By THURGOOD MARSHALL,
W. ROBERT MING,
Z. ALEXANDER LOOBY,
Attorneys for Petitioner.

MAURICE WEAVER,
EDWARD R. DUDLEY,
FRANKLIN H. WILLIAMS,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 534

LOYD KENNEDY,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of Court Below

The opinion has not been recorded officially. It appears at pages 416-426 of the record. Suggestion of Error (Petition to Rehear) was overruled on the 21st day of October, 1947, without opinion.

II

Jurisdiction

1

The statutory provision is United States Judicial Code, Section 237(b), as amended February 13, 1925, 43 Stat. 937, 28 U. S. C. 344(b).

2

The date of the judgment in the Circuit Court of Maury County, Tennessee, is November 19, 1946, affirmed by the Supreme Court of Tennessee on June 24, 1947. Suggestion of Error was overruled on the 21st day of October, 1947.

3

That the nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237(b), *supra,* appears from the following:

> The claim of Federal constitutional rights was timely raised in petitioner's Plea in Abatement (R. 10 A), petitioner's Motion to Quash the several panels of veniremen (R. 321); and, upon the exceptions taken to the rulings of the trial judge in refusing petitioner the opportunity to introduce evidence of exclusion beyond the instant panel (R. 326-327).
>
> These questions were expressly considered and the rights ruled against by the trial court (R. 18-37, 327).
>
> The questions were specifically passed upon by the Tennessee Supreme Court in its opinion (R. 416-426).

The claim so made and denied is that the conviction of petitioner, a Negro, by a trial jury upon an indictment found and returned by a grand jury, from which juries all qualified Negroes were and have been for a long period of years systematically excluded solely because of their race and color, was in contravention and violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

The further claim made and denied is that the refusal of the trial court to allow the introduction of evidence of the systematic and long-continued exclusion of Negroes from juries in Maury County, Tennessee, denied petitioner due

process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The following cases, among others, sustain the jurisdiction of this Court, as to the invalidity of a conviction by a trial jury upon an indictment returned by a grand jury, from which juries Negroes were and have been systematically excluded in that county over a long period of years solely because of race: *Strauder* v. *West Virginia,* 100 U. S. 303; *Neal* v. *Delaware,* 103 U. S. 370; *Carter* v. *Texas,* 177 U. S. 442; *Rogers* v. *Alabama,* 192 U. S. 226; *Norris* v. *Alabama,* 294 U. S. 587; *Hollis* v. *Oklahoma,* 295 U. S. 395; *Hale* v. *Kentucky,* 303 U. S. 613; *Pierre* v. *Louisiana,* 306 U. S. 354; *Smith* v. *Texas,* 311 U. S. 128; *Patton* v. *Mississippi,* — U. S. —, No. 122, October Term, 1947.

Neal v. *Delaware, supra; Norris* v. *Alabama, supra; Pierre* v. *Louisiana, supra; Carter* v. *Texas, supra,* and *Patton* v. *Mississippi, supra,* establish clearly that the systematic exclusion of Negroes from juries solely because of race may be established and proved by testimony concerning the composition of juries within the county over a long period of years prior to the immediate case.

Statement of Case

The petitioner, and another Negro, William A. Pillow, residents of the City of Columbia, State of Tennessee, were arrested on the 26th day of February, 1946, by members of the Tennessee State Highway Patrol. They were charged with having committed assault and battery with intent to commit murder in the first degree on the body of a Patrolman Ray Austin, a white man, during a recent interracial disturbance in that city. They were subsequently indicted on the 21st day of March, 1946, and having plead "Not Guilty" were tried in the Circuit Court of Maury County, Tennessee, at the February, 1946 Term. The jury acquitted petitioner's co-defendant and convicted petitioner of assault with intent to commit murder in the second de-

gree and fixed his punishment at not more than five years in the state penitentiary. The Supreme Court of Tennessee affirmed the conviction on the 26th day of June, 1947 and overruled Assignments of Error on the 21st day of October, 1947.

Errors Relied Upon

The points urged are in summary form as follows:

POINT I

The Supreme Court of the State of Tennessee erred in affirming the conviction of petitioner, a Negro, by a trial jury of white persons, upon an indictment found and returned by a grand jury of white persons in Maury County, Tennessee, in which county all qualified Negroes were and have been for a long period of years systematically excluded from all jury service solely because of their race or color in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

A. The systematic and deliberate exclusion of Negroes from jury service solely because of their race or color denies a Negro defendant charged with crime the equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

B. The Supreme Court of the State of Tennessee erred in affirming the conviction of petitioner, a Negro, upon an indictment found and returned by a grand jury of a county where all qualified Negroes were and have been for a long period of years systematically excluded from service on grand juries solely because of race or color in contravention of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

C. The Supreme Court of the State of Tennessee erred in affirming the conviction of petitioner, a Negro, by a trial

jury in a county where all qualified Negroes were and have been for a long period of years systematically excluded from trial juries solely because of their race or color in contravention of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

POINT II

The Supreme Court of the State of Tennessee erred in affirming the conviction of petitioner, a Negro, where the trial court denied him due process of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in refusing to allow the introduction of evidence of systematic exclusion of Negroes from its juries over a long period of years prior to petitioner's trial.

ARGUMENT

POINT I

The Supreme Court of the State of Tennessee erred in affirming the conviction of petitioner, a Negro, by a trial jury of white persons, upon an indictment found and returned by a grand jury of white persons in Maury County, Tennessee, in which County all qualified Negroes were and have been for a long period of years systematically excluded from all jury service solely because of their race or color in contravention of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States.

A. *The systematic and deliberate exclusion of Negroes from jury service solely because of their race or color denies a Negro defendant charged with crime the equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.*

The principle that state exclusion of Negroes from juries solely because of their race or color denies Negro defend-

ants in criminal cases the equal protection of the laws required by the Fourteenth Amendment was enunciated by this Court over a half century ago.[3]

The principle applies whether the discrimination was by virtue of a statute,[4] or by action of administrative officers,[5] and whether the exclusion is from service on petit juries[6] or grand juries.[7]

The discrimination complained of by petitioner was not embodied in the Tennessee statutes,[8] but rather resulted from a systematic, intentional, deliberate and invariable practice on the part of administrative officers of Maury County, Tennessee, to exclude Negroes from jury service within the county.

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[3] *Strauder* v. *West Virginia*, 100 U. S. 303 (1880).

[4] *Bush* v. *Kentucky*, 107 U. S. 110.

[5] *Neal* v. *Delaware*, 103 U. S. 370; *Carter* v. *Texas*, 177 U. S. 442; *Rogers* v. *Alabama*, 192 U. S. 226.

[6] *Strauder* v. *West Virginia*, *supra*; *Norris* v. *Alabama*, 294 U. S. 587.

[7] *Carter* v. *Texas*, *supra*; *Patterson* v. *Alabama*, 294 U. S. 600; *Smith* v. *Texas*, 311 U. S. 128; *Patton* v. *Mississippi*, — U. S. —.

[8] Williams, Tenn. Code Annotated (1934)—10006 WHO MAY BE A JUROR:

> Every male citizen who is a freeholder or householder, and twenty-one years of age, is legally qualified to act as a grand or petit juror, if not otherwise incompetent under the express provisions of this Code.

10009—WHO MAY NOT BE:

> Persons convicted of certain infamous offenses, specially designated in this code, persons of unsound mind, persons not in the full possession of the senses of hearing and seeing, and habitual drunkards, are incompetent to act as jurors.

B. *The Supreme Court of the State of Tennessee erred in affirming the conviction of petitioner, a Negro, upon an indictment found and returned by a grand jury of a county where all qualified Negroes were and have been for a long period of years systematically excluded from service on grand juries solely because of race or color in contravention of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.*

Petitioner filed a Plea in Abatement to the indictment returned against him alleging among other things that members of his race were systematically excluded from grand jury service in Maury County, Tennessee.[9] In sup-

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[9] The Plea in Abatement alleged among other things that:

The grand jury and all persons comprising the panel from which said grand jury was selected were white persons.

That long prior to the selection of names for the then current jury list or jury box and at that time there had been and were numerous colored citizens of the State of Tennessee and residents of said county who in every respect had been and were qualified to serve as petit and grand jurors in civil and criminal trials in said county including trials of felonies.

That the county court or Board of Jury Commissioners or the person or persons who by law is or are authorized to select or appoint the persons from whom the jury is or are to be chosen unlawfully and in violation of their respective oaths of office and of the Constitution of the State of Tennessee and that of the United States and the law of the land did exclude and always have excluded from jury service all qualified Negroes, members of the colored race and of African descent, solely on account of their race and color.

That at all times it had been and was at that time the custom in said Maury County to use white men exclusively for petit and grand jury service in any and all cases including trials of felonies and in selecting the jury at that time and the supplement or supplements thereto this custom was followed by those charged with the duty of appointing or selecting those from whom the jury was to be drawn for this case.

That all qualified Negroes were thereby excluded from the possibility of sitting as grand jurors.

That by the reason of this unlawful exclusion of all qualified Negroes from the current jury list or box, defendant has been greatly prejudiced

port thereof 206 white and Negro residents of the county were called and testified.[10] Evidence showed the population of Maury County to consist of approximately 30,000 white people and 10,000 Negroes (R. 159).[11]

The approximately 200 Negro witnesses, were with only one or two possible exceptions, fully qualified for jury service. They represented a true cross section of the county's Negro population, ranging in age from 86 (RW. 144) down to 23 years (RW. 578) and janitors, (RW. 150, 162, 301, 470, 566), railroad workers (RW. 456, 554), post office employees (RW. 561), churchmen (RW. 495) and chemical workers (RW. 500), miners (RW. 318), peddlers (RW. 213), printers (RW. 367), grocers (RW. 111, 119, 237), farmers (RW. 131, 134, 192, 244, 257, 273, 405, 423), bricklayers (RW. 100), carpenters (RW. 21), electricians (RW. 103), barbers (RW. 18, 64, 170, 262, 321), businessmen (RW. 15, 137, 233, 533), teachers (RW. 28, 114, 127, 144, 208, 241, 542), dentists (RW. 35), ministers (RW. 87), retired men (RW. 127, 301, 398), and veterans of World War I (RW. 555, 589) and II (RW. 315, 338, 454, 504, 517, 542, 594). *Not one witness had ever known or heard of a Negro being called for or serving on a jury in the criminal courts of Maury County prior to February 25, 1946.*

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and has been denied due process and the equal protection of the laws in violation of the Constitution of the United States and of the State of Tennessee.

That this custom of excluding Negroes from jury service has continued in said county for more than fifty years (R. 10A–10J).

[10] By stipulation entered in this case on July 7, 1946, the proof offered on hearing on Pleas in Abatement in the case of *State of Tennessee* v. *Sol. Blair, et al.*, was accepted as proof in this case and was preserved by a Wayside Bill of Exceptions (R. 19).

[11] The official count of the returns of the Sixteenth Census of the United States filed as an exhibit in this case showed the white male population over 21 to be 8,817 and the Negro male population over 21 to be 2,918 (See Exhibit "A" attached hereto).

The testimony of one eminently qualified witness[12] succinctly sums up the facts concerning the service of Negroes on juries in Maury County. From 1901 to the present, this former county officer had not heard of any Negro being on a grand or petit jury in the county though, "undoubtedly," there were "a number" of Negroes qualified to serve (RW. 159).

This testimony remained uncontradicted, and made out a prima facie case of systematic and deliberate exclusion of Negroes from jury service.[13] The state attempted to overcome such proof by testimony of more than fifty white witnesses to the effect that not one of them had ever been called or served.[14] It is noteworthy, however, that *not one of these state's witnesses had ever heard or known of a Negro being called or serving on a jury in Maury County, prior to petitioner's trial.*

Two members of the Maury County Jury Commission testified. Both emphatically denied that race was a consideration in making up the jury list (RW. 858, 869).

Witnesses for the state testified that there were approximately thirteen Negroes whose names appeared upon the panel from which the grand and trial juries in the instant case were drawn. It is clear from an examination of the record that such names were purposely placed upon the instant panel in an attempt to circumvent the clear consti-

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[12] W. C. Whitshire, a practicing attorney, justice of the peace, county attorney and judge of County Criminal Court for various periods of time following his admission to the bar of Maury County in 1888 (RW. 153).

[13] *Neal* v. *Delaware, supra,* 397; *Norris* v. *Alabama, supra,* 591; *Pierre* v. *Louisiana,* 306 U. S. 354, 361; *Patton* v. *Mississippi,* — U. S. —.

[14] Of these white witnesses called, three were ministers, four teachers, eleven officers of state, city or county, one in the military service twenty-two years, and seven professional men, three neither taxpayers nor property owners—more than half, therefore, were either ineligible to serve or eligible for exemption under the statute (Wm.'s Tenn. Code Ann. No. 10010). Undoubtedly this was an important factor tending to show why they were never called.

tutional requirement as enunciated by this court not to have Negroes systematically excluded from juries in a criminal trial involving a Negro defendant. In any event, the record makes it eminently clear, and the state did not dispute the fact, that no Negroes served on either the grand or petit jury involved in this case.

James D. Carruthers, whose name was allegedly properly upon the jury list, in testifying concerning his receipt of a card ordering him to appear for service, stated, "I really didn't know whether they meant to subpoena a Negro. That was the trouble about it. I thought perhaps it was a mistake about my name" (RW. 24). This witness was excused by the court. Three other Negroes testified for the state to the effect that they had received cards allegedly intended for them calling them to appear for jury service: Earnest Lipscomb, a taxpayer registered as residing at Route 2, Mount Pleasant, Tenn., received a card forwarded to "Earnest Lipscomb, Hampshire, Tenn." (RW. 917). This witness was not available at the time the trial jury was chosen. Another witness, Maxie Perryman, who testified to being commonly known as "Moxie," received a card addressed to "Max." He approached his "boss" and requested to be excused from service. His employer subsequently informed him that he would not have to appear for service—this in spite of the fact that the said employer was not a county official (RW. 929, 939, 940). This witness never reported to any official of the court or the county. The third Negro witness testifying for the state is one Tom Kittrell who could neither read nor write and he stated that upon the receipt of the card and upon ascertaining its contents, he also arranged through his boss, likewise not a county official, "to be excused" from jury service (RW. 955). This witness also failed to appear at any time before the court. In both of these latter two instances, the witness' employer apparently had a close re-

lationship with the sheriff or judge or some other person authorized to excuse jurors or who would assume such authority. Three other names on the jury list, L. E. Buford, John Griggs, Louis Nicholson, were stated to be names of Negroes by witnesses claiming to know them. All three were deceased at the time of their alleged call for service (RW. 898, 948 and 975). The names of two other Negroes allegedly appearing on the list were Edgar Brown and J. R. Martin. Cards sent to their addresses as registered in the tax books were returned to the sheriff by the post office marked "Addressees Unfound" (RW. 898, 899). Two more names were identified as belonging to Negroes by white members of the community who were not sure whether there were other individuals not Negroes in the county bearing the same name. These were Henry Howard and Will James (RW. 950, 970). In any event, neither of these persons appeared for jury service. The last name, allegedly that of a Negro, on the list was Ewell Lowry. This person, it was testified, had gone "North" some two years before (RW. 980).

Thus, giving the state's testimony the greatest credence possible, it would appear that on the panel from which the grand jury herein was drawn, the names of thirteen Negroes appeared. Of this number three were dead, (RW. 898, 975, 914, 980) only three actually received cards, of which number two had incorrect spelling or addresses and two of these three were excused by their "bosses"; one of the individuals allegedly on the list could not read; one remained unaccounted for and the last, the only Negro of whom any number of other witnesses had heard of having been called, one Carruthers, believed it was a mistake and was excused by the sheriff. These circumstances which operated in each instance to prevent any Negro from being available for service on the grand jury, when considered together clearly show a pattern, design or method of pre-

arranged conspiracy to prevent Negroes from actually serving while attempting to place an aura of legitimacy around the jury panel. The appearance of most of these names in the taxbooks adds to the belief that such a conspiracy was in effect (RW. 1002-1016). These facts make the state's attempted proof impotent to offset the showing that Negroes were systematically excluded. As stated in *Norris* v. *Alabama*, 294 U. S. 587, 1935:

> "We are of the opinion that the evidence required a different result from that reached in the state court. We think that the evidence that for a generation or longer no Negro had been called for service on any jury in Jackson County, that there were Negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite ages but that no names of Negroes were placed on the jury rolls, and the testimony with respect to the lack of appropriate consideration of the qualifications of Negroes, established the discrimination which the Constitution forbids." *Norris v. Alabama*, 294 U. S. 587 (1935)

C. The Supreme Court of the State of Tennessee erred in affirming the conviction of petitioner, a Negro, by a trial jury in a county where all qualified Negroes were and have been for a long period of years systematically excluded from trial juries solely because of their race or color in contravention of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioner, at the outset of his trial, moved to quash the trial jury panels.[15] To sustain his contention of delib-

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[15] See Petition *(supra)*.

erate discrimination, petitioner called only one witness [16] as the court had erroneously restricted petitioner's evidence of discrimination to the formation of the panel for the instant case (R. 326-7—see: Point II, herein).[17]

The witness testified that at the beginning of that term of court, one hundred names were selected for a panel of veniremen for the term (R. 329); that the grand jury was selected from this list (R. 330); following which the judge excused the fifteen individuals whose names remained thereon, (R. 331). None of these was tendered for service on the trial jury. One Negro allegedly was on this list and was excused (R. 332).[18] Another panel of seventy-five was selected on November 12 (R. 332) and exhausted the next day. The witness testified that she could not remember whether or not there were any Negroes thereon. Seventy-five more names were selected the next day, thirty-five appearing (R. 333). In this latter group, there was allegedly one Negro who was immediately challenged by the State and dismissed by the court (R. 334). The judge then apparently prepared a list of business and professional men from the community (R. 334-337), to which list the

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[16] Miss Dabney Anderson, Circuit Clerk of Maury County, Tennessee, R. 328.

[17] The view that the exclusion of Negroes from jury service in prior years is no evidence on the question of discrimination against them in the particular case before the court—which apparently was the position taken by the state court herein—has found some support in other jurisdictions. *State* v. *Turner*, 133 La. 555, 63 So. 169 (1913); *State* v. *Thomas*, 250 Mo. 189, 157 S. W. 330 (1913).

This view, however, has been definitely overruled by this Court's decisions in such cases as *Norris* v. *Alabama*, *supra*, and *Patton* v. *Mississippi*, *supra*, wherein exclusion in previous years was one of the principal facts relied on by this Court in support of its conclusion that the evidence clearly showed discrimination. The effect of such decisions in this respect was expressly recognized in *State* v. *Logan*, 341 Mo. 1164; 111 S. W. (2d) 110 (1937).

[18] Apparently this refers to witness Carruthers.

names of three or four Negroes known personally to the court were subsequently added (R. 336).

Judge Ingram then testified for the State as follows: That there were no Negroes on the jury selected to try this case (R. 356);[19] that he added the names of several Negroes to his list of professional men after three white men on the first list were not found. He testified that Henry McGlothin, a Negro, appeared on one list, and that the name of Albert Wright, another Negro, appeared on a second list (R. 357). He further testified that the list of business and professional men which he prepared was compiled from the membership of the following organizations in the community: Rotary Club, Kiwanis Club, Lions Club, and the Junior Chamber of Commerce, all of which were organizations whose membership was restricted to white persons. Not one of these Negroes, however, served on the jury or was available at the time of actual choosing the jury. They either had not appeared or had been excused by the court or peremptorily challenged by the state.

A consideration of this testimony and the evidence adduced on petitioner's plea in abatement clearly shows that Negroes were systematically excluded pursuant to custom and practice from trial jury service at the trial of petitioner and for a period of almost fifty years prior thereto in Maury County, Tennessee, solely because of their race or color in contravention of the guarantees contained in the Fourteenth Amendment to the Constitution of the United States. The calling of one or two Negro citizens allegedly for jury service and then summarily chal-

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[19] It is to be noted that the witness—the judge sitting in this case apparently excused the fifteen remaining individuals on the jury panel only after knowledge that petitioner was moving to quash the panel (R. 361).

lenging or dismissing them does not obviate the basic error.[20] As this court has pointed out at this term:

> "When a jury selection plan, whatever it is, operates in such a way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes [21] or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand." [22]

Point II

The Supreme Court of the State of Tennessee erred in affirming the conviction of petitioner, a Negro where the trial court denied him due process of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in refusing to allow the introduction of evidence of systematic exclusion of Negroes from its juries, over a long period of years prior to petitioner's trial.

At various times during the hearings on petitioner's plea in abatement and throughout the hearing on the motion to quash the trial jury panels, the court restricted petitioner's proof of exclusion to the panel drawn for the present

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[20] Even assuming that the placing of a few Negroes' names on the lists of individuals called after the original panel herein was exhausted should sufficiently satisfy the constitutional requirements, the arbitrary and immediate challenging by the State and excusing of such individuals by the court was obviously still motivated by a desire to conform to the custom and practice of denying Negroes the right to serve on trial juries in the county.

[21] The census figures showing 6,021 Negroes to 17,815 white persons in the community were submitted upon this motion. In the face of this proof, the lower court overruled petitioner's motion (R. 37) to which petitioner duly excepted. The Supreme Court, in affirming the conviction, sustained the action of the lower court, thereby denying petitioner the equal protection of the laws.

[22] *Patton* v. *Mississippi, supra.*

term of court,[23] nor would the court on either hearing allow the jury box to be brought into court for examination to ascertain if the names of any Negroes appeared therein (RW. 297).

Numerous decisions of this Court reversing convictions of Negro petitioners on the ground that their constitutional rights had been violated through the systematic exclusion of members of their race from juries solely because of race

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[23] On the plea in abatement, the following occurred:

"Q. Before the present term of court, or up until the 20th of March, do you know of any Negro who has been summoned to serve on a jury?

"Gen. Bumpus: The State objects to that.

"Court: Sustained.

"Mr. Looby: We except, just for the record, may I ask if he knows if one has ever been summoned?

"Court: I sustained the objection" (RW. 14).

This restriction was repeated by the court upon the examination of numerous witnesses (RW. 16, 18, 20, 22).

On the motion to quash, the following occurred:

"Mr. Looby: Very well, sir.

Now, if your Honor, please, as stated in this original motion, the objection was raised to the panel is predicated upon a long series of events which we contend constitute a custom, usage and method that has existed over a long period of time.

We are now prepared and ready to offer proof in support of our contention. We understand your Honor to have ruled earlier in this case, to have made a ruling as to the time concerning which proof would be allowed. We now want to offer proof, if your Honor please, to show that for more than half a century Negroes have been excluded from jury service in Maury County. Your Honor has made a ruling thereon, but now the motion is up for a hearing, we want to offer that proof subject to your Honor's ruling then, unless that ruling is modified, so as to permit us to introduce proof.

"The Court: We could hear proof only as to the formation of the panel or panels which were formed in the selection of this trial jury.

"Mr. Looby: If the Court please, let the record show that we are prepared to offer proof in support of the allegations prior to that time and that the proof is not offered merely in obedience to your Honor's ruling.

"The Court: You can except to the action of the Court.

"Mr. Looby: Very well, your Honor, we so except.

"The Court: All right" (R. 326-327).

have been based upon a consideration of the existence of such exclusion over a long continuing period of years.[24]

Conclusion

Petitioner was indicted and tried by juries from which members of his race were systematically excluded solely because they were Negroes. This not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.

The court's refusal to quash the indictment herein and its subsequent refusal to quash the various panels from which the trial jury convicting petitioner were drawn thus raise important issues under the Constitution and laws of the United States.

WHEREFORE, it is respectfully submitted that this Court should issue its Writ of Certiorari to review the judgment of the Supreme Court of the State of Tennessee and that judgment should be reversed.

Respectfully submitted,

THURGOOD MARSHALL,
W. ROBERT MING,
Z. ALEXANDER LOOBY,
Attorneys for Petitioner.

MAURICE WEAVER,
EDWARD R. DUDLEY,
FRANKLIN H. WILLIAMS,
Of Counsel.

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[24] *Neal* v. *Delaware*, 103 U. S. 370; *Norris* v. *Alabama*, 294 U. S. 587; *Pierre* v. *Louisiana*, 306 U. S. 354.

EXHIBIT "A" to Petition for Certiorari

DEPARTMENT OF COMMERCE

Bureau of the Census

Washington

June 11, 1946.

I hereby certify, that according to the official count of the returns of the Sixteenth Census of the United States, on file in the Bureau of the Census, the population of the County of Maury, State of Tennessee, by age, race, and sex, as of April 1, 1940, is as shown in the attached excerpt from the bulletin entitled "Population, Second Series, Characteristics of the Population, Tennessee, 1940."

[SEAL.] J. C. CAPT,
Director of the Census.

DEPARTMENT OF COMMERCE

Office of the Secretary

I hereby certify, that J. C. Capt, who signed the foregoing certificate, is now, and was at the time of signing, Director of the Census, and that full faith and credit should be given his certification as such.

In witness whereof, I have hereunto subscribed my name and caused the seal of the Department of Commerce to be affixed, this eleventh day of June one thousand nine hundred and forty-six.

For the Secretary of Commerce:

[SEAL.] GERALD RYAN,
Chief Clerk.

(Here follows Exhibit "B" to Petition for Certiorari)

Table 22.—AGE, RACE, AND SEX, BY COUNTIES: 1940 AND 1930—Con.

[Figures for white population in 1930 have been revised to include Mexicans who were classified with "Other races" in the 1930 reports. 1930 totals include unknown age]

COUNTY AND AGE	1940 POPULATION											1930 POPULATION								
	All classes			Native white		For.-born white		Negro		Other races		All classes	Native white		For.-born white		Negro		Other races	
	Total	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female		Male	Female	Male	Female	Male	Female	Male	Female
MACON	14,904	7,569	7,335	7,447	7,229	-	-	122	106	-	-	13,872	6,619	6,740	-	-	168	151	-	-
Under 5 years	1,498	767	726	754	711	-	-	13	15	-	-	1,648	831	787	-	-	13	17	-	-
5 to 9 years	1,656	845	811	822	798	-	-	13	13	-	-	1,762	857	866	-	-	18	21	-	-
10 to 14 years	1,652	852	800	836	789	-	-	16	11	-	-	1,598	755	799	-	-	21	17	-	-
15 to 19 years	1,550	757	793	746	787	-	-	11	6	-	-	1,449	708	704	-	-	29	20	-	-
20 to 24 years	1,265	664	601	654	594	-	-	10	7	-	-	1,201	568	594	-	-	22	17	-	-
25 to 29 years	1,120	546	574	540	566	-	-	6	8	-	-	988	451	468	-	-	10	6	-	-
30 to 34 years	982	498	485	482	475	-	-	16	10	-	-	871	416	439	-	-	8	8	-	-
35 to 39 years	938	450	488	443	483	-	-	7	5	-	-	1,528	775	727	-	-	16	10	-	-
40 to 44 years	819	404	415	397	410	-	-	7	5	-	-									
45 to 49 years	754	382	372	377	368	-	-	5	4	-	-	1,221	596	596	-	-	10	19	-	-
50 to 54 years	645	345	300	341	294	-	-	4	6	-	-									
55 to 59 years	541	258	286	251	286	-	-	2	2	-	-	890	453	416	-	-	14	7	-	-
60 to 64 years	477	255	222	254	218	-	-	1	4	-	-									
65 to 69 years	427	233	194	231	190	-	-	2	4	-	-	586	291	295	-	-	5	5	-	-
70 to 74 years	287	147	140	142	138	-	-	3	2	-	-									
75 years and over	297	171	126	167	122	-	-	4	4	-	-	238	124	108	-	-	2	4	-	-
Under 1 year	277	150	127	147	123	-	-	3	4	-	-	349	190	159	-	-	2	2	-	-
21 years and over	8,299	4,220	4,079	4,153	4,019	-	-	67	60	-	-	7,166	3,556	3,454	-	-	86	73	-	-
MADISON	54,115	26,273	27,842	16,897	17,699	58	32	9,323	10,171	-	-	51,059	15,955	16,347	69	43	9,021	9,622	2	-
Under 5 years	4,701	2,358	2,343	1,422	1,366	-	-	936	977	-	-	4,911	1,556	1,493	-	1	943	918	-	-
5 to 9 years	4,774	2,395	2,379	1,459	1,423	-	-	936	956	-	-	5,657	1,719	1,678	-	-	1,118	1,142	-	-
10 to 14 years	5,174	2,619	2,555	1,555	1,541	2	-	1,062	1,014	-	-	5,167	1,568	1,597	1	-	977	1,024	-	-
15 to 19 years	5,364	2,633	2,731	1,632	1,614	-	-	1,011	1,117	-	-	5,481	1,600	1,620	1	1	1,062	1,137	-	-
20 to 24 years	4,765	2,236	2,529	1,371	1,549	-	1	865	979	-	-	5,157	1,422	1,667	4	1	941	1,121	1	-
25 to 29 years	4,556	2,165	2,393	1,391	1,457	-	2	774	933	-	-	4,233	1,259	1,425	6	4	708	830	1	-
30 to 34 years	4,361	2,005	2,356	1,343	1,529	3	1	659	826	-	-	3,861	1,023	1,161	4	2	539	632	-	-
35 to 39 years	4,032	1,867	2,165	1,249	1,365	3	1	615	779	-	-	6,557	2,109	2,234	9	6	996	1,203	-	-
40 to 44 years	3,174	1,507	1,667	976	1,096	2	4	529	567	-	-									
45 to 49 years	3,099	1,448	1,651	977	1,084	5	2	466	565	-	-									
50 to 54 years	2,744	1,391	1,353	953	946	2	2	436	405	-	-	5,294	1,836	1,692	15	15	877	859	-	-
55 to 59 years	2,268	1,168	1,100	859	807	6	5	303	288	-	-									
60 to 64 years	1,774	843	931	607	688	11	5	225	238	-	-	3,048	1,086	989	17	3	585	418	-	-
65 to 69 years	1,544	800	744	535	498	4	3	261	243	-	-									
70 to 74 years	906	455	451	313	308	12	2	131	141	-	-	1,494	542	514	7	5	210	216	-	-
75 years and over	877	383	494	266	348	3	3	114	143	-	-									
Under 1 year	907	464	443	387	364	-	-	177	179	-	-	929	318	283	-	-	168	160	-	-
21 years and over	38,090	19,786	17,304	10,536	11,380	51	32	5,199	5,892	-	-	28,789	9,219	9,596	67	41	4,718	5,146	2	-
MARION	19,140	9,762	9,378	9,062	8,644	12	6	688	728	-	-	17,549	8,204	7,784	22	15	747	777	-	-
Under 5 years	2,129	1,079	1,050	1,034	987	-	-	55	63	-	-	2,222	1,078	1,005	-	-	67	82	-	-
5 to 9 years	2,273	1,144	1,129	1,059	1,067	-	-	65	62	-	-	2,375	1,129	1,051	-	-	95	100	-	-
10 to 14 years	2,271	1,185	1,086	1,125	1,000	-	-	60	86	-	-	2,045	973	877	-	-	98	97	-	-
15 to 19 years	2,188	1,121	1,067	1,042	921	-	-	79	86	-	-	1,962	905	870	-	-	82	105	-	-
20 to 24 years	1,622	831	791	768	704	-	-	63	87	-	-	1,650	734	784	1	1	64	66	-	-
25 to 29 years	1,460	758	727	701	680	-	-	58	47	-	-	1,248	568	569	1	-	52	58	-	-
30 to 34 years	1,373	651	712	620	664	1	1	40	47	-	-	997	455	466	-	-	35	41	-	-
35 to 39 years	1,173	563	610	519	556	-	-	44	54	-	-	1,803	805	797	2	2	98	99	-	-
40 to 44 years	960	497	463	461	429	-	-	36	34	-	-									
45 to 49 years	876	451	425	412	386	-	-	39	39	-	-									
50 to 54 years	772	398	374	353	331	-	1	45	42	-	-	1,476	708	683	4	1	81	67	-	-
55 to 59 years	622	331	291	303	270	3	-	25	21	-	-									
60 to 64 years	491	253	238	233	224	1	2	19	12	-	-	1,080	522	427	7	4	44	36	-	-
65 to 69 years	457	229	228	205	204	2	-	22	24	-	-									
70 to 74 years	260	152	108	140	99	1	1	11	8	-	-	488	230	211	3	3	18	23	-	-
75 years and over	253	114	139	97	122	4	1	13	16	-	-	223	97	98	4	4	9	11	-	-
Under 1 year	392	202	190	186	176	-	-	16	14	-	-	441	207	203	-	-	14	17	-	-
21 years and over	9,994	5,062	4,932	4,649	4,525	12	6	401	401	-	-	8,591	3,968	3,823	22	15	388	373	-	-
MARSHALL	16,030	8,011	8,019	6,954	6,965	10	2	1,047	1,052	-	-	15,574	6,650	6,588	7	4	1,168	1,217	-	-
Under 5 years	1,263	655	608	558	526	-	-	97	82	-	-	1,467	613	599	-	-	127	128	-	-
5 to 9 years	1,318	678	640	580	538	-	-	98	102	-	-	1,734	767	676	-	-	147	144	-	-
10 to 14 years	1,479	742	737	617	622	-	-	125	115	-	-	1,638	668	646	-	-	177	137	-	-
15 to 19 years	1,611	838	773	709	651	-	-	129	122	-	-	1,552	679	597	-	-	127	149	-	-
20 to 24 years	1,471	740	731	635	627	1	-	104	104	-	-	1,251	616	542	-	-	98	101	-	-
25 to 29 years	1,318	671	647	582	555	-	-	89	92	-	-	1,051	415	473	2	1	76	84	-	-
30 to 34 years	1,155	576	579	511	508	-	-	65	71	-	-	990	410	458	-	1	64	62	-	-
35 to 39 years	999	461	538	395	470	2	1	63	67	-	-	1,869	808	802	3	1	109	152	-	-
40 to 44 years	879	431	448	395	396	-	-	36	52	-	-									
45 to 49 years	863	411	472	366	410	3	-	40	62	-	-									
50 to 54 years	904	467	437	410	391	1	1	56	45	-	-	1,680	719	748	2	-	96	115	-	-
55 to 59 years	797	404	393	373	351	-	-	31	42	-	-									
60 to 64 years	630	288	342	263	309	1	-	24	33	-	-									
65 to 69 years	590	297	293	260	269	1	-	36	24	-	-	1,346	561	523	-	-	91	71	-	-
70 to 74 years	367	191	176	165	155	-	-	26	21	-	-									
75 years and over	366	161	205	143	187	-	-	18	18	-	-									
Under 1 year	253	123	130	109	115	-	-	14	15	-	-	351	170	140	-	1	20	20	-	-
21 years and over	10,034	4,938	5,096	4,343	4,488	10	2	565	606	-	-	280	134	106	-	-	22	28	-	-
MAURY	40,357	20,013	20,344	15,089	15,139	37	20	4,947	5,188	-	2	8,926	3,906	3,906	7	4	568	635	-	-
Under 5 years	3,717	1,876	1,841	1,425	1,390	-	-	451	451	-	-	34,016	13,104	12,045	35	24	4,728	5,080	-	-
5 to 9 years	3,888	1,942	1,946	1,459	1,443	-	-	483	503	-	-	3,492	1,292	1,349	-	-	464	487	-	-
10 to 14 years	4,051	2,061	1,990	1,556	1,483	-	1	505	506	-	-	3,806	1,387	1,334	-	-	543	543	-	-
15 to 19 years	4,072	1,998	2,079	1,496	1,574	1	1	496	504	-	-	3,716	1,348	1,234	-	1	561	572	-	-
20 to 24 years	3,796	1,809	1,987	1,361	1,460	-	1	448	526	-	-	3,525	1,216	1,212	1	-	535	561	-	-
25 to 29 years	3,598	1,752	1,841	1,308	1,340	2	-	442	501	-	-	2,847	966	1,044	2	1	372	462	-	-
30 to 34 years	2,991	1,490	1,501	1,118	1,110	5	4	367	386	-	1	2,197	764	867	2	2	242	319	-	-
35 to 39 years	2,561	1,261	1,300	960	998	3	1	298	301	-	-	1,998	673	794	2	2	226	296	-	-
40 to 44 years	2,280	1,059	1,221	797	907	3	4	259	310	-	-	2,963	1,471	1,465	6	4	439	629	-	-
45 to 49 years	2,014	990	1,024	760	748	5	-	225	281	-	-									
50 to 54 years	1,872	938	934	709	697	3	3	226	233	-	1	3,698	1,804	1,841	3	4	586	555	-	-
55 to 59 years	1,509	754	755	565	555	2	1	187	199	-	-									
60 to 64 years	1,333	711	622	529	478	5	1	177	143	-	-	2,575	941	894	7	3	406	324	-	-
65 to 69 years	1,219	645	574	458	426	1	2	186	146	-	-									
70 to 74 years	716	365	351	268	268	4	-	93	83	-	-	1,474	536	474	9	5	242	208	-	-
75 years and over	745	367	378	260	267	3	1	104	110	-	-	734	256	237	2	2	114	123	-	-
Under 1 year	702	366	336	276	260	-	-	90	76	-	-	721	259	280	-	-	83	99	-	-
21 years and over	23,838	11,771	12,067	8,817	8,944	26	18	2,918	3,103	-	2	18,824	6,648	6,799	34	23	2,538	2,784	-	-

Taken from a second series population bulletin for Tennessee: 1940

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CHARACTERISTICS OF THE POPULATION

Table 22.—AGE, RACE, AND SEX, BY COUNTIES: 1940 AND 1930—Con.

[Figures for white population in 1930 have been revised to include Mexicans who were classified with "Other races" in the 1930 reports. 1930 totals include unknown age]

	1940 POPULATION											1930 POPULATION								
	All classes			Native white		For.-born white		Negro		Other races		All classes	Native white		For.-born white		Negro		Other races	
	Total	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female		Male	Female	Male	Female	Male	Female	Male	Female
MEIGS	5,393	2,322	3,071	2,181	2,907	2	3	139	161	-	-	6,127	2,977	2,759	2	-	198	198	-	-
Under 5 years	824	418	406	394	382	-	-	24	24	-	-	886	407	370	-	-	25	24	-	-
5 to 9 years	765	392	373	368	349	-	-	24	24	-	-	856	496	378	-	-	27	24	-	-
10 to 14 years	755	382	373	356	353	-	-	24	20	-	-	800	380	368	-	-	27	20	-	-
15 to 19 years	710	385	325	359	310	-	-	26	15	-	-	698	345	297	-	-	27	25	-	-
20 to 24 years	562	280	282	271	266	-	-	9	16	-	-	548	357	346	-	-	18	17	-	-
25 to 29 years	497	269	228	251	218	1	1	17	9	-	-	362	167	170	-	-	15	11	-	-
30 to 34 years	418	207	211	199	204	-	-	8	7	-	-	318	144	156	-	-	7	9	-	-
35 to 39 years	369	203	166	192	159	-	-	11	13	-	-	566	282	271	-	-	15	18	-	-
40 to 44 years	292	156	136	148	133	-	-	8	3	-	-									
45 to 49 years	237	133	104	121	96	-	2	12	6	-	-	538	261	244	1	-	17	15	-	-
50 to 54 years	237	121	116	117	113	-	-	4	3	-	-									
55 to 59 years	213	115	108	111	95	-	-	4	8	-	-	348	190	181	-	-	14	13	-	-
60 to 64 years	164	82	82	77	79	-	-	5	3	-	-									
65 to 69 years	167	88	79	80	76	-	-	8	3	-	-	195	85	100	1	-	3	6	-	-
70 to 74 years	99	57	42	53	37	-	-	4	5	-	-									
75 years and over	79	34	45	32	43	1	-	1	2	-	-	77	43	33	-	-	3	3	-	-
Under 1 year	153	79	74	74	66	-	-	5	6	-	-	248	118	115	-	-	5	6	-	-
21 years and over	2,340	1,168	1,172	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
MONROE	24,275	12,438	11,837	11,976	11,383	8	5	453	449	-	-	21,279	10,384	10,004	8	3	487	487	2	2
Under 5 years	2,981	1,535	1,446	1,466	1,391	-	-	49	55	-	-	2,719	1,368	1,349	-	-	88	44	-	-
5 to 9 years	2,885	1,524	1,361	1,485	1,314	-	-	39	47	-	-	2,007	1,459	1,395	-	-	80	69	-	-
10 to 14 years	2,821	1,454	1,367	1,400	1,322	-	-	54	45	-	-	2,721	1,363	1,336	-	-	61	60	-	1
15 to 19 years	2,779	1,444	1,335	1,379	1,276	-	-	65	57	-	-	2,454	1,200	1,186	-	-	57	70	1	-
20 to 24 years	2,168	1,127	1,036	1,067	990	1	-	39	46	-	-	1,806	847	876	-	1	35	46	-	-
25 to 29 years	1,826	901	925	856	885	-	-	45	40	-	-	1,320	577	698	1	-	18	26	-	-
30 to 34 years	1,535	763	772	742	742	-	1	21	29	-	-	1,189	555	576	-	-	27	31	-	-
35 to 39 years	1,347	635	712	615	690	1	-	19	22	-	-									
40 to 44 years	1,170	591	579	566	549	-	1	25	29	-	-	2,160	994	1,057	1	1	52	55	-	-
45 to 49 years	1,066	550	518	525	501	-	-	25	17	-	-									
50 to 54 years	922	449	473	432	452	1	-	16	21	-	-	1,865	933	845	1	1	47	37	-	1
55 to 59 years	771	384	387	366	377	-	2	18	8	-	-									
60 to 64 years	677	356	321	346	309	1	1	9	11	-	-	1,171	608	508	5	-	25	25	-	-
65 to 69 years	610	331	279	316	268	2	-	13	11	-	-									
70 to 74 years	367	204	163	197	160	1	-	6	3	-	-	674	348	311	-	-	11	9	1	-
75 years and over	355	190	165	180	157	1	-	9	8	-	-	290	141	139	-	-	11	9	-	-
Under 1 year	565	291	294	275	278	-	-	6	11	-	-	563	271	272	-	-	4	6	-	-
21 years and over	12,380	6,269	6,113	6,023	5,874	6	5	236	234	-	-	10,048	4,797	4,798	6	3	215	230	1	1
MONTGOMERY	33,346	16,365	16,981	11,608	11,833	41	30	4,720	5,118	1	-	30,862	10,364	10,323	43	32	4,899	5,218	3	-
Under 5 years	3,013	1,551	1,462	1,102	1,025	-	-	449	437	-	-	2,882	1,135	1,109	1	-	483	554	-	-
5 to 9 years	3,270	1,624	1,646	1,125	1,189	-	-	499	457	-	-	2,645	1,253	1,247	-	-	576	569	-	-
10 to 14 years	3,469	1,709	1,760	1,207	1,205	-	-	502	555	-	-	2,596	1,118	1,116	-	-	556	606	-	-
15 to 19 years	3,426	1,651	1,775	1,182	1,245	2	1	467	529	-	-	2,301	1,080	1,044	-	-	592	585	-	-
20 to 24 years	2,985	1,371	1,614	975	1,104	-	1	396	509	4	-	2,684	895	907	3	3	405	471	-	-
25 to 29 years	2,797	1,350	1,447	943	1,009	3	3	404	435	-	-	2,046	670	720	4	2	291	359	-	-
30 to 34 years	2,351	1,162	1,189	855	883	3	-	304	306	-	-	1,672	604	692	2	1	242	330	1	-
35 to 39 years	2,100	983	1,117	728	749	2	4	253	364	-	-									
40 to 44 years	1,844	893	951	648	650	2	3	243	298	-	-	3,574	1,181	1,238	11	6	512	626	-	-
45 to 49 years	1,751	852	899	591	625	3	5	256	269	-	-									
50 to 54 years	1,656	821	835	571	575	9	3	241	257	-	-	3,120	998	967	6	6	575	567	1	-
55 to 59 years	1,316	656	660	466	468	6	4	184	188	-	-									
60 to 64 years	1,016	515	501	370	356	4	1	140	145	1	-	2,147	746	691	8	5	365	311	1	-
65 to 69 years	1,041	546	495	369	330	2	3	175	162	-	-									
70 to 74 years	613	323	290	218	197	2	2	103	91	-	-	1,219	456	404	5	3	190	161	-	-
75 years and over	698	356	340	253	224	3	-	102	116	-	-	573	209	183	2	6	88	85	-	-
Under 1 year	562	294	268	219	179	-	-	75	89	-	-	613	217	213	-	-	89	95	-	-
21 years and over	19,549	9,548	10,001	6,792	6,940	29	29	2,715	3,032	1	-	16,652	5,562	5,634	41	32	2,597	2,783	3	-
MOORE	4,093	2,062	2,031	1,931	1,911	-	-	131	120	-	-	4,037	1,870	1,863	-	-	155	149	-	-
Under 5 years	371	177	194	168	182	-	-	9	12	-	-	451	214	206	-	-	13	19	-	-
5 to 9 years	393	196	197	179	186	-	-	17	11	-	-	476	199	234	-	-	25	18	-	-
10 to 14 years	441	224	217	211	208	-	-	13	14	-	-	438	202	201	-	-	13	22	-	-
15 to 19 years	411	203	208	186	196	-	-	17	12	-	-	429	211	172	-	-	23	23	-	-
20 to 24 years	341	180	161	171	148	-	-	9	13	-	-	444	248	196	-	-	13	18	-	-
25 to 29 years	293	152	141	137	132	-	-	15	9	-	-	263	116	133	-	-	8	6	-	-
30 to 34 years	274	141	133	133	126	-	-	8	7	-	-	237	125	99	-	-	6	7	-	-
35 to 39 years	253	130	123	126	119	-	-	4	4	-	-	446	304	207	-	-	20	15	-	-
40 to 44 years	234	117	117	112	109	-	-	5	8	-	-									
45 to 49 years	205	104	101	99	94	-	-	5	7	-	-									
50 to 54 years	207	111	96	101	92	-	-	10	4	-	-	401	184	197	-	-	10	10	-	-
55 to 59 years	159	77	82	73	82	-	-	4	-	-	-									
60 to 64 years	155	82	73	81	67	-	-	1	6	-	-	309	157	127	-	-	15	10	-	-
65 to 69 years	150	78	72	69	67	-	-	9	5	-	-									
70 to 74 years	95	52	43	48	39	-	-	4	4	-	-	165	80	74	-	-	7	4	-	-
75 years and over	81	38	43	37	41	-	-	1	2	-	-	77	35	36	-	-	3	3	-	-
Under 1 year	78	38	40	34	35	-	-	4	5	-	-	94	45	41	-	-	2	6	-	-
21 years and over	2,401	1,222	1,179	1,148	1,110	-	-	74	69	-	-	2,162	1,008	1,011	-	-	79	64	-	-
MORGAN	15,248	8,296	6,946	7,880	6,886	31	31	385	29	-	-	13,603	6,992	6,035	56	42	427	51	-	-
Under 5 years	1,695	882	813	878	811	-	-	4	2	-	-	1,789	906	869	-	-	9	5	-	-
5 to 9 years	1,705	854	851	848	849	-	-	6	2	-	-	1,874	963	901	-	-	6	4	-	-
10 to 14 years	1,820	949	871	947	865	-	1	2	5	-	-	1,602	824	767	-	-	9	2	-	-
15 to 19 years	1,757	941	816	914	815	-	-	27	1	-	-	1,390	739	638	-	-	16	7	-	-
20 to 24 years	1,474	892	582	793	580	-	-	99	2	-	-	1,289	680	495	-	-	104	10	-	-
25 to 29 years	1,229	749	480	664	477	-	-	85	3	-	-	1,025	527	390	2	1	100	5	-	-
30 to 34 years	1,031	594	437	525	435	-	-	69	2	-	-	829	401	345	4	3	71	5	-	-
35 to 39 years	904	494	410	454	409	1	-	39	1	-	-	1,414	721	606	9	10	62	6	-	-
40 to 44 years	705	385	320	367	316	1	3	17	1	-	-									
45 to 49 years	637	343	294	326	289	1	3	16	2	-	-	1,125	556	502	11	11	37	6	-	-
50 to 54 years	595	329	266	311	257	9	7	9	2	-	-									
55 to 59 years	539	292	247	281	240	6	6	5	1	-	-	780	405	284	11	9	10	1	-	-
60 to 64 years	390	194	196	186	191	3	3	5	2	-	-									
65 to 69 years	354	196	158	192	150	2	6	2	2	-	-	371	181	172	13	4	1	-	-	-
70 to 74 years	212	122	90	117	88	5	2	-	-	-	-									
75 years and over	195	80	115	77	114	3	-	-	1	-	-	165	88	70	6	4	2	-	-	-
Under 1 year	300	148	152	147	152	-	-	1	-	-	-	356	183	172	-	-	-	1	-	-
21 years and over	7,950	4,476	3,474	4,184	3,425	31	30	321	19	-	-	6,666	3,402	2,764	56	42	371	31	-	-

OVERSIZE PAGE SEE NEXT FRAME
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40 to 44 years	1,170	591	579	568	569	-	1	23	10	-	-	1,668	938	845	1	1	47	37	-	1
45 to 49 years	1,066	550	516	525	501	-	-	25	17	-	-									
50 to 54 years	923	449	473	432	458	1	-	16	21	-	-									
55 to 59 years	771	384	387	366	377	-	2	18	8	-	-	1,171	608	508	5	-	25	25	-	-
60 to 64 years	677	356	321	346	309	1	1	9	11	-	-									
65 to 69 years	610	331	279	316	268	2	-	15	11	-	-									
70 to 74 years	367	204	163	197	160	1	-	6	3	-	-	674	342	311	-	-	11	9	1	-
75 years and over	355	190	165	180	159	1	-	9	6	-	-	290	141	129	-	-	11	5	-	-
Under 1 year	565	281	284	275	278	-	-	6	11	-	-	553	271	272	-	-	4	6	-	-
21 years and over	12,880	6,367	6,113	6,023	5,874	8	5	256	234	-	-	10,048	4,797	4,799	8	8	215	220	1	1
MONTGOMERY	33,346	16,865	16,981	11,608	11,833	41	30	4,720	5,118	1	-	30,882	10,964	10,323	42	32	4,899	5,516	5	-
Under 5 years	3,013	1,551	1,462	1,108	1,025	-	-	449	437	-	-	2,932	1,135	1,109	1	-	463	554	-	-
5 to 9 years	3,270	1,634	1,646	1,135	1,189	-	-	499	457	-	-	2,645	1,268	1,247	-	-	576	559	-	-
10 to 14 years	3,469	1,709	1,760	1,207	1,305	-	-	502	555	-	-	2,996	1,118	1,116	-	-	556	606	-	-
15 to 19 years	3,436	1,651	1,775	1,182	1,245	2	1	467	529	-	-	2,801	1,080	1,044	-	-	582	595	-	-
20 to 24 years	2,965	1,371	1,614	975	1,104	-	1	396	509	-	-	2,604	895	907	3	3	405	471	-	-
25 to 29 years	2,797	1,350	1,447	943	1,009	3	3	404	435	-	-	2,046	670	720	4	2	291	359	-	-
30 to 34 years	2,351	1,168	1,189	955	988	3	-	304	306	-	-	1,872	604	692	2	1	248	330	1	-
35 to 39 years	2,100	983	1,117	788	749	2	4	258	364	-	-	2,574	1,181	1,238	11	6	518	686	-	-
40 to 44 years	1,844	893	951	648	650	2	2	243	298	-	-									
45 to 49 years	1,751	852	899	591	625	3	5	256	269	-	-	2,120	998	957	6	6	575	567	1	-
50 to 54 years	1,656	821	835	571	575	9	2	241	257	-	-									
55 to 59 years	1,316	656	660	464	498	6	4	184	158	-	-									
60 to 64 years	1,016	515	501	370	356	4	1	140	145	1	-	2,147	746	891	8	5	365	511	1	-
65 to 69 years	1,041	546	495	369	330	2	3	175	162	-	-									
70 to 74 years	613	323	290	218	197	2	2	103	91	-	-	1,219	456	404	5	3	190	161	-	-
75 years and over	696	356	340	258	224	3	-	101	116	-	-	573	309	183	2	6	88	85	-	-
Under 1 year	568	294	268	219	179	-	-	75	89	-	-	613	317	212	-	-	89	95	-	-
21 years and over	19,549	9,548	10,001	6,793	6,940	39	29	2,715	3,082	1	-	16,652	5,562	5,534	41	32	2,597	2,753	5	-
MOORE	4,098	2,062	2,036	1,981	1,911	-	-	131	120	-	-	4,097	1,870	1,868	-	-	136	149	-	-
Under 5 years	371	177	194	168	182	-	-	9	13	-	-	451	214	206	-	-	13	19	-	-
5 to 9 years	393	196	197	179	186	-	-	17	11	-	-	476	199	234	-	-	25	18	-	-
10 to 14 years	441	224	217	211	208	-	-	13	14	-	-	438	208	201	-	-	13	22	-	-
15 to 19 years	411	208	203	186	196	-	-	17	12	-	-	429	211	172	-	-	25	23	-	-
~~60 to 64 years~~	~~341~~	~~180~~	~~161~~	~~173~~	~~158~~	~~-~~	~~-~~	~~14~~	~~10~~	~~-~~	~~-~~	~~344~~	~~149~~	~~196~~	~~-~~	~~-~~	~~13~~	~~18~~	~~-~~	~~-~~
25 to 29 years	293	152	141	137	152	-	-	15	9	-	-	263	116	133	-	-	8	6	-	-
30 to 34 years	274	141	133	133	126	-	-	8	7	-	-	287	125	99	-	-	6	7	-	-
35 to 39 years	259	130	129	126	119	-	-	4	4	-	-	446	204	207	-	-	20	15	-	-
40 to 44 years	234	117	117	112	109	-	-	5	8	-	-									
45 to 49 years	205	104	101	99	94	-	-	5	7	-	-	401	184	197	-	-	10	10	-	-
50 to 54 years	207	111	96	101	92	-	-	10	4	-	-									
55 to 59 years	159	77	82	73	82	-	-	4	-	-	-	309	157	127	-	-	15	10	-	-
60 to 64 years	155	82	73	81	67	-	-	1	6	-	-									
65 to 69 years	150	78	72	69	67	-	-	9	5	-	-									
70 to 74 years	95	52	43	43	39	-	-	4	4	-	-	165	80	74	-	-	7	4	-	-
75 years and over	81	38	43	37	41	-	-	1	2	-	-	77	35	36	-	-	3	3	-	-
Under 1 year	78	38	40	34	35	-	-	4	5	-	-	94	45	41	-	-	2	6	-	-
21 years and over	2,401	1,222	1,179	1,148	1,110	-	-	76	69	-	-	2,168	1,008	1,011	-	-	79	64	-	-
MORGAN	13,242	6,296	6,946	7,880	6,886	31	31	385	29	-	-	13,609	5,998	6,085	56	48	427	51	-	-
Under 5 years	1,695	882	813	878	811	-	-	4	2	-	-	1,709	906	869	-	-	9	5	-	-
5 to 9 years	1,708	854	851	848	849	-	-	6	2	-	-	1,874	963	901	-	-	6	4	-	-
10 to 14 years	1,820	949	871	947	865	-	1	2	5	-	-	1,603	824	767	-	-	9	3	-	-
15 to 19 years	1,757	941	816	914	815	-	-	27	1	-	-	1,390	739	638	-	-	16	7	-	-
20 to 24 years	1,474	892	582	792	560	-	-	99	2	-	-	1,289	680	495	-	-	104	10	-	-
25 to 29 years	1,229	749	480	664	477	-	-	85	3	-	-	1,085	587	390	2	1	100	5	-	-
30 to 34 years	1,031	594	437	525	435	-	-	69	2	-	-	839	401	345	4	3	71	5	-	-
35 to 39 years	904	494	410	454	409	1	-	39	1	-	-	1,416	721	608	9	10	68	6	-	-
40 to 44 years	705	385	320	367	316	1	2	17	1	-	-									
45 to 49 years	637	343	294	324	269	1	3	16	2	-	-	1,125	558	502	11	11	37	6	-	-
50 to 54 years	595	329	266	311	257	9	7	9	2	-	-									
55 to 59 years	539	292	247	281	240	6	6	5	1	-	-	780	405	384	11	9	10	1	-	-
60 to 64 years	390	194	196	186	191	3	3	5	2	-	-									
65 to 69 years	354	196	158	198	150	2	6	2	2	-	-	371	181	172	13	4	1	-	-	-
70 to 74 years	212	122	90	117	88	5	2	-	-	-	-									
75 years and over	195	80	115	77	114	3	-	-	1	-	-	165	83	70	6	4	2	-	-	-
Under 1 year	300	148	152	147	152	-	-	1	-	-	-	356	183	172	-	-	-	1	-	-
21 years and over	7,950	4,476	3,474	4,124	3,485	31	30	321	19	-	-	6,666	3,402	2,764	56	48	371	81	-	-

Fire

Office of CLERK OF THE SUPREME COURT

FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE

I, DAVID S. LANSDEN, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Population Breakdown Exhibit *of said Court, pronounced at its December term, 19*46 *in case of* Loyd Kennedy *against* The State *as appears of record now on file in my office.*

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the 9th *day of* January *19*46.

David S. Lansden *Clerk*

By _____ *D. C.*

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

LOYD KENNEDY,
Petitioner,
v.
STATE OF TENNESSEE,
Respondent.
No. 534.

Certiorari to the Supreme Court of Tennessee.

REPLY BRIEF FOR RESPONDENT.

NAT TIPTON,
Supreme Court Building,
Nashville 3, Tennessee,
Attorney for Respondent.

ROY H. BEELER,
Attorney General and Reporter of Tennessee,
Supreme Court Building,
Nashville 3, Tennessee,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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SUPREME COURT OF THE UNITED STATES.

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LOYD KENNEDY, Petitioner,
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STATE OF TENNESSEE, Respondent.
No. 534.

Certiorari to the Supreme Court of Tennessee.

REPLY BRIEF FOR RESPONDENT.

May It Please the Court:

Inasmuch as the petition is sought to be prosecuted upon the typewritten record, and since counsel for respondent has not been furnished with a copy of such typewritten record, it will be impossible to make apt references to the typewritten record in this reply brief. Instead, an effort will be made to designate the witnesses by whose testimony the facts relied on by the respondent shall appear.

STATEMENT OF THE CASE.

The prosecution in this case grows out of one of those infrequent racial clashes, regretted by both white and black alike, which sometimes occur. The facts of this particular prosecution are stated in the opinion of the Supreme Court of Tennessee as follows:

This case followed racial disturbances at Columbia in February, 1946. There had been a clash between some members of the two races on the afternoon of February 25, 1946. In this trouble, a city policeman was shot, and some members of the State Highway Patrol were sent to Columbia for the purpose of assisting local officers in the restoration of order. After the arrival of the State Patrol, it was decided that at daylight the next morning the patrol would move in and undertake to disarm and arrest persons in the locality of the disturbance. The area was the colored section of the town, extending from Main and Woodland Streets and known as Mink Slide. After daybreak on the morning of February 26, the patrolmen, under the direction of Sheriff Underwood, moved into the area in question. The patrolmen were dressed in their regular uniform, indicating their official capacity, and a number of them were armed with machine and riot guns. They proceeded to go and knock on the doors of the establishments in this locality and notify the occupants, if any, to come out and they would not be harmed. This continued without incident until they reached a barber shop owned by Sol Blair. The testimony of the State shows that when they knocked on the door the patrolmen saw someone in the shop, and noted that this person was armed with a shotgun.

Five witnesses for the State testified that at least one shot was fired toward the patrolmen from the inside of

this building. The shot struck and wounded Austin, one of the highway patrolmen. The patrolmen returned the fire and entered the building. The back door of the shop was locked. In a shower stall at the back of the shop they found the defendant crouched against the wall, with a single-barreled shotgun at his side. This gun contained an empty shell, which, apparently, had been recently discharged. Pillow, who was acquitted, was found crouched down on the floor, under some cover. A double-barreled shotgun was also found in this building when the officers entered. This gun was empty, but two exploded shells were found on the floor. One or two shotgun shells were also found on the person of both the defendant and Pillow, and a sack of shells was found in the barber shop.

Opinion, pp. 2-3.

The preponderance of the evidence is that the shots were fired from the inside of the shop, and before any shots were fired by the patrolmen.

Opinion, p. 5.

ARGUMENT ON POINT 1 OF THE PETITION.

To adequately comprehend the situation, a reference to the relevant Tennessee statutes may be in order. In Maury County, the situs of this trial, the selection of veniremen is governed by a special statute, to-wit, Ch. 45, Private Acts of Extra Session of 1913. This statute is too long and involved to be set out verbatim. Its provisions may be briefly summarized as follows:

By it a jury commission of three members is provided. They are required to meet upon the first Monday in July biennially and to select the names of not less than 750 nor more than 1500 prospective veniremen from the tax rolls of the county or any other reliable source, apportioning the prospective veniremen as near as practicable to the population of the several civil districts of the county. These names are to be placed in a locked box and not less than 10 days prior to the meeting of any term of court, a child of tender years, in the presence of the jury commission, draws from the box the names of the prospective veniremen for such term of court. This Act became effective in September 1913. Presumably the first stated meeting of the jury commission was held in July 1914.

The record shows very definitely that on the first Monday in July 1944, the jury commission for Maury County met and placed in this box the names of 750 veniremen. The two surviving members of the then jury commission, one having died in the interim, testified definitely that the sole source of these names which they placed in this box at that time was the then current or 1943 tax rolls. These jury commissioners testify and it was so found by the trial court after a personal inspection of the tax rolls, that such tax rolls contain no symbols identifying the race of the taxpayer. They testify that in some instances they knew the prospective veniremen but that in others and perhaps

a majority of the cases, they did not know him. They definitely deny any racial discrimination in the selection of these parties. The respondent thinks that subsequent developments bear out the truthfulness of their statements in this respect.

The term of court at which the petitioner was indicted convened on February 25, 1945, and on that morning a grand jury was empaneled. The crime for which petitioner stands convicted was not committed until the following morning. This fact alone should explode the hysterical charges of conspiracy contained in the petition insisting that a few members of the negro race were promptly placed on this jury list to give alleged legality of form to the selection of the grand jury indicting the petitioner.

In Tennessee to be eligible as a juryman one need be but a male more than the age of 21, and either a householder or freeholder, and to be free from conviction of an infamous crime. Neither a literacy test nor the previous payment of any form of tax is required. (Code of Tennessee, Section 9990.) Grand juries in Tennessee consist of 13 members, a foreman appointed by the court for a period of two years (Code of Tennessee, Section 10026), and 12 additional members, these 12 additional members being drawn by lot. The names of all the jurors in attendance upon the opening day of court are placed in a hat or other receptacle, and the first 12 names drawn from this hat constitute the grand jury, in addition to the foreman previously mentioned. (Code of Tennessee, Section 10021.)

In February, 1946, and prior to the beginning of the term of court at which the petitioner was indicted, the jury commissioners of Maury County duly met and, pursuant to statute, a five-year-old child, unable to read or write, drew from the box the names of 109 prospective

veniremen for the ensuing term of court. Of this 109 names so drawn, 10 thereof were definitely shown to have been members of the negro or colored race. These 10 members of the negro race were Malcolm Alderson, L. E. Buford, Will Jones, Sam Kittrell, Maxey Perryman, Jim Russell, Henry Howard, Ewell Lowery, Lewis Nicholson and Ernest Lipscomb. The testimony in the case, without substantial contradiction, shows that all 10 of these parties were members of the negro race. The trial judge so found, and his finding in that respect was expressly approved by the Supreme Court of Tennessee.

Upon the drawing of this venire, it was placed in the hands of the Sheriff of the county for the purpose of being summoned. The method used by the Sheriff for summoning these prospective veniremen was by postcard, notifying them that they had been drawn for jury service and to report upon the day stated on such card. Two or three cards were introduced, and show that they were mailed on February 19, or almost one week before the grand jury was empaneled. Of these 10 members of the colored race who were drawn as veniremen, it is shown that L. E. Buford and Lewis Nicholson had died since their names were placed in the jury box, and that Malcolm Alderson and Ewell Lowery had left the county. Tom Kittrell and Maxey Perryman both testified that they actually received these cards summoning them for jury service, and, being non-desirous of serving on the jury, went to their employers and arranged with them to have them excused from such service. Incidentally, there is no suggestion in the record that the desire to be excused did not proceed solely and alone from the wishes of these individual veniremen. Ernest Lipscomb, another veniremen, seems to be rather illiterate. His testimony is that he could hardly read, and that when his card was received by him his son, who was in school, had to read it to him. His testimony indicates that on the day in question he

came to Columbia, the county seat of Maury County, to be present in response to this card, and that he waited around in the hall or other place outside the court room for quite awhile, and later made inquiry of the foreman of the grand jury if his name was on his list of witnesses. Lipscomb seems to have been completely at a loss upon this occasion, and without initiative to make an investigation as to the cause of his having been summoned. The record fails to disclose what became of Will Jones, Jim Russell or Henry Howard. It is not shown that the cards addressed to them were returned to the Sheriff undelivered. Incidentally, it appears from the record that a desire for jury service was the exception, rather than the rule, in Maury County at this time, for it discloses that of the 109 prospective veniremen summoned for jury service upon this particular time, only 16 thereof, including Ernest Lipscomb, were present. Evidently excuses from jury service were not difficult to obtain on the part of members of either race.

The petition for certiorari makes one statement totally without basis in the record. On page 19 it is stated that it was clear that the names of these members of the colored race were purposefully placed upon the instant panel in an attempt to circumvent the constitutional requirement. With the record showing that these names were placed in this jury box in July, 1944, among numerous other names, and with it showing definitely that they were drawn from this box prior to February 19, 1946, or at least one week prior to the commission of the crime for which petitioner stands convicted, it is obvious that unless this Court credit these jury commissioners with psychic qualities and an ability to foresee events one week in the future, the charge that they were placed upon this panel for the purpose of circumventing the constitutional requirement falls flat of its own weight.

It is perfectly true that the testimony introduced upon this plea in abatement on behalf of the petitioner was to the effect that for a considerable period of time no negro had been known to serve either on a grand or petit jury in Maury County. We recognize that this Court in opinions too numerous to mention, has held that proof of this type makes a prima facie case or creates a presumption that members of the negro race were excluded systematically by reason of their race or color and that it becomes then incumbent upon the prosecution to negative such fact. In this connection, however, we respectfully insist that the holdings of this Court are to the effect that the right guaranteed to persons of any race is to be indicted by a grand jury and tried by a petit jury in the formation of which there shall exist no racial discrimination. One charged with crime obtains no immunity therefrom by virtue of the fact that his ancestors may have been victims of race discrimination. Hill v. Texas, 316 U. S. 400; and Patton v. Miss. (No. 122 October Term 1947), both definitely bear out this insistence. The presumption of racial discrimination arising from evidence showing non-service of members of the negro race upon juries for a protracted period must stand in the same plight as any other presumption of law and should yield to definite proof that members of that race were actually placed upon the jury lists to be summoned for jury service.

Of course, there is no right upon the part of persons charged with crime to either an indictment or trial by a mixed jury. Akins v. Texas, 325 U. S. 398, 403. Likewise, there exists no right to proportional representation upon the venire. Akins v. Texas, supra; Patten v. Miss., supra.

The petition for certiorari contains several inaccuracies in connection with the transcript. For instance, it is stated therein that the veniremen John Griggs, Edgar Brown and J. R. Martin were members of the negro race. There

is not a line of testimony in the transcript tending to show that these parties were negro and even though the erroneous statement on behalf of the petitioner might redound to the advantage of the respondent, the latter desires accuracy as a prime consideration.

The respondent thinks that so far as the grand jury in the present case be concerned, the testimony negatives the presumption that discrimination was intended in the present case. It may be true that the number of negro veniremen drawn from this box at the drawing under challenge was not proportionately that which would have been made had there been a drawing directly proportional to the respective population to the county. But such is not required under the authorities, supra. Criticism also is made of the fact that in the interim 2 of the 10 members of the negro race had died. It has been the observation of respondent that the Grim Reaper makes no discrimination in picking his victims and by the law of average a proportionate number from the white race were also called to their ancestors. Since these names were placed on this list in the box in July 1944 and from a list compiled the previous summer, it is not strange that deaths may have occurred therein. Likewise, complaint is made that 2 of the negro veniremen had removed from the county. The migratory nature of a vast number of our population from 1943 to 1946 is so well known as to require no evidence. After all, fluctuations of residence do occur among both races. There is no intimation these two were chosen because they were going to move.

The respondent respectfully insists that the evidence shows that in the present case there was no systematic nor determined effort to discriminate against the colored race in the setting up of the panel from which the grand jury was drawn in the present case. Ten veniremen from a total of 109 constitutes a fairly reasonable proportion

thereof and certainly where that number of members of the negro race were placed upon the panel, such fact definitely negatives any thought of discrimination as such.

ARGUMENT ON POINT 2.

This contention insists that the plaintiff in error was discriminated against by virtue of his color and race in selection of the trial jury. At the outset, it may be conceded that under the previous decisions of this Court the trial judge was in error in declining to allow the plaintiff in error to show by testimony that for a number of years past no member of his race had been a juror on trial juries. The effect of this showing would be to simply make a prima facie case or create the presumption of subsequent discrimination and cast the burden upon the prosecution to show that there was no discrimination in this particular case. The testimony heard with reference to the method by which the grand jury was drawn showed definitely that no member of the negro race had served upon trial juries in Maury County for a number of years past and we concede such to be the fact. This Court has always reserved to itself the right to make an independent investigation of the record when a constitutional question, such as the one here presented, is involved and for the purpose of such investigation this concession above mentioned is definitely made and so far as the respondent be concerned this Court may investigate this question with this concession added and thus obviate the necessity of remanding the case to the Supreme Court of Tennessee for the introduction of this testimony. Frankly, the respondent desires a decision upon the merits of the constitutional questions here presented, unfettered by any subordinate issue with reference to the exclusion of relevant testimony upon this question.

The transcript shows that 72 veniremen were summoned and appeared for jury service of this cause. Of this num-

ber 13 were excused by the Court for various reasons without tendering them to the parties, leaving a total of 59 who were tendered to the parties as prospective jurors. Of this 59, 4 were member of the race to which the petitioner belongs. The transcript further shows that of the regular jurors summoned for this particular term of court 15, including one member of the petitioner's race, remained after the selection of the grand jury. These 15 were excused by the trial court, he stating as his reason therefor that they had remained in attendance for two days with no cases pending and that for this reason he excused the entire fifteen.

Now it is our insistence that where the jury panel eventually tendered to the parties contains members of his race, such constitutes a definite showing that no discrimination in fact was practiced against him by reason of his race or color. It is perhaps true that the panel as originally constituted did not contain as many members of his race as eventually, but the respondent insists that discrimination must be tested by the jury panel as finally submitted to the parties and not by preliminary jury lists.

But it is contended on behalf of the petitioner that the action of the prosecution in challenging the four members who were tendered to the parties amounted to an unlawful discrimination against him. By statute in Tennessee (Code, Section 10020) in felonies of the grade here involved the prosecution is allowed four peremptory challenges for each defendant on trial. All of the persons of the petitioner's race so challenged were challenged peremptorily by the prosecution.

The very nature of a peremptory challenge indicates that it may be used within the numerical limits provided by the party in question without being called to account for his reason in so doing. So far in the annals of criminal trial, no court that the writer can find after diligent

investigation, has ever held that an error may be successfully assigned upon the use of a peremptory challenge. The only decision the writer can find (State v. Logan, ... Mo. ..., 126 S. W. [2d] 236) holds that the use by the prosecution of its peremptory challenge to strike the names of negroes from the trial jury did not constitute error.

To hold to the contrary would involve this Court in doing by indirection what it has consistently held need not be done. Since the decision in Virginia v. Rives, 100 U. S. 313, this Court has been consistent in holding that a negro on trial is not entitled to a mixed jury composed of members of his own race and of the white race. For this Court now to hold that the prosecutor may not exhaust his peremptory challenges on members of the negro race to the full extent of the statutory number would amount in substance to a holding that a negro on trial would be entitled to a mixed jury. If this Court holds that it is error for the prosecutor to challenge peremptorily each negro who appears upon the trial jury panel, to the extent of the challenges allowable to the prosecution by statute, the only possible conclusion that could be drawn from such a holding is that a mixed jury is an essential ingredient of due process where a member of a particular race be on trial. Such a holding would set at naught a long line of decisions of this Court and would be another step in the direction of complete supervision of all phases of state criminal trials, a condition at odds with state sovereignty and the true purpose of this Court.

It is our insistence that the transcript shows that there was no systematic discrimination against members of the negro race in Maury County in the present case despite the presumption thereof arising from the fact that none had been known to sit upon a grand or petit jury for an extensive period of time. It is a part of the judicial his-

tory of Tennessee that 27 members of the negro race were indicted in connection with the incident growing out of the clash between the two races in Maury County. Of these 25 were indicted in one indictment and the petitioner and his co-defendant in another; 23 of those indicted in the first indictment were acquitted at the hands of an all-white jury and the two who were convicted by the verdict of the jury were later granted a new trial and their cases dismissed upon the ground of the insufficiency of the evidence. In the indictment wherein petitioner is charged, his co-defendant was acquitted at the hands of this same jury. These facts would seem to indicate that the judicial processes of the State of Tennessee accord fair and impartial trials to members of the colored race charged with crime, even though the crime be alleged to have been committed against members of the dominant race.

In conclusion, the respondent respectfully insists that the Supreme Court of Tennessee properly ruled upon the constitutional questions here involved and that the petition should be denied.

Respectfully submitted,

NAT TIPTON,
Supreme Court Building,
Nashville 3, Tennessee,
Attorney for Respondent.

ROY H. BEELER,
Attorney General and Reporter
of Tennessee,
Supreme Court Building,
Nashville 3, Tennessee,
Of Counsel.

I hereby certify that I have mailed a copy of this reply brief to Z. Alexander Looby, Nashville, Tennessee, Attorney for the Petitioner.

Nat Tipton.